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No. 406

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In the Supreme Court of the United States

OCTOBER TERM, 1961

ANNA J. McDOWELL, PETITIONER

v.

ABRAHAM A. RIBICOFF, SECRETARY OF HEALTH, EDUCATION AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The District Court handed down no opinion; its findings and conclusions are set forth at R. 40a-43a.[1] The opinion of the Court of Appeals is reported at 292 F.2d 174.

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[1] "R" refers to the printed Appendix attached to Appellant's brief in the Court of Appeals, filed by petitioner here as the record under Rule 21(1).

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1961. The petition for writ of certiorari was filed on September 13, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the basis of this record, the Court of Appeals properly reinstated the administrative finding that petitioner was not engaged in the "trade or business" of being an executor and hence was not eligible for benefits under the Social Security Act.

STATUTES INVOLVED

Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides in pertinent part:

> * * * The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. * * *

Section 211 of the Social Security Act, 42 U.S.C. 411, provides in pertinent part:

> (a) The term "net earnings from self-employment" means the gross income, as computed un-

der chapter 1 of Title 26, derived by an individual from any trade or business carried on by such individual, less the deductions allowed under such chapter which are attributable to such trade or business, * * *

* * * * *

(c) The term "trade or business", when used with reference to self-employment income or net earnings from self-employment, shall have the same meaning as when used in section 23 of Title 26[2] * * *.

STATEMENT

Petitioner instituted this action in the District Court to set aside the decision of the Secretary of Health, Education and Welfare, holding her ineligible for social security benefits. (R. 41a). The Secretary's decision was based on the ground that petitioner had not been engaged in the "trade or business" of administering her aunt's estate and thus lacked sufficient quarters of coverage at the time of her application. (R. 39a).

The petitioner is a housewife. (R. 22a). She was a non-professional executrix of the estate of her aunt whose will, dated February 16, 1952, covered assets valued at approximately $123,000 and consisted entirely of blue-chip securities and a single $4,000 mortgage on property owned by petitioner's husband.

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[2] Section 23 of Title 26, which was a reference to Section 23 of the Internal Revenue Code, 1939, was repealed by Section 7851 of the Internal Revenue Code of 1954, and is now covered by Section 162 of Title 26.

(R. 10a, 38a). The petitioner, as principal beneficiary of the estate, was entitled to securities valued at $47,604, and, in addition, the mortgage on her husband's property was cancelled. (Pet. App. "B", p. 12).

The estate imposed no management problems nor did it call for the exercise of any considerable degree of discretion. (R. 38a). With the exception of the mortgage, which simply called for cancellation, the entire estate consisted of "blue-chip" securities with a readily ascertainable market value. (R. 10a). The petitioner's nominal duties required the preparation of an inventory; recording of dividends; sale of some shares through a broker for payment of taxes, specific legacies, debts amounting to $194.86, and the reinvesting of the proceeds into a single $14,000 United States Treasury note; and the transferring of securities to specific and residuary legatees. (R. 36a, 38a-39a). All of these were paper transactions that could be performed in a relatively short period of time, and at petitioner's convenience. Thus, she was not required to devote a full or even substantial amount of her time to such duties. (R. 39a). "Within about seven months after the claimant was appointed executrix, all of the beneficiaries, except the residuary legatees had been paid. It appears that all tax matters concerning the estate had been taken care of by March 2, 1957, less than twenty-one months after she was appointed and at that time the estate was ready to be closed." (Opinion of the Court of Appeals, Pet. App. "B", p. 14).

The petitioner received commissions in the sum of $3,000 in 1955 and $2,000 in 1956. In 1956 and

1957 she paid "social security taxes" on these commissions. (R. 14a).

The Bureau of Old Age and Survivors Insurance of the Social Security Administration, taking into account the facts set forth above, denied petitioner's claim for social security benefits on the ground that she had not established that she had been engaged in a "trade or business". (R. 11a). A referee of the Administration reversed the Bureau's decision. (R. 33a). However, on further review, the Appeals Council, acting for the Secretary, reversed the referee and reinstated the Bureau's decision. (R. 39a).

The present action was then filed in the District Court, which summarily reversed the Secretary's determination that petitioner had not been engaged in a "trade or business". (R. 43a). The Court of Appeals reversed the decision of the District Court and upheld the determination of the Secretary that petitioner was not engaged in carrying on a "trade or business" within the meaning of the Social Security Act and that her remuneration therefore did not constitute net earnings from self-employment so as to qualify her for social security benefits. (Pet. App. "B", pp. 12-19).

ARGUMENT

The determination of the underlying issue turns essentially on the particular facts of petitioner's case. The governing law is well settled. Since the question presented is factual and the Secretary's determination was plainly supported by substantial evidence,

the Court of Appeals correctly held that that determination was binding. There is no occasion for further review.

1. Section 211(c) of the Social Security Act, 42 U.S.C. 411(c), *supra*, p. 3, provides that "The term 'trade or business', when used with reference to self-employment income or net earnings from self-employment, shall have the same meaning as when used in [Section 162 of the Internal Revenue Code of 1954]".[3] This Court has emphasized, in internal revenue cases, that "To determine whether the activities of a taxpayer are 'carrying on a business' requires an examination of the facts in each case." *Higgins* v. *Commissioner*, 312 U.S. 212, 217; *United States* v. *Pyne*, 313 U.S. 127, 129. The Court has further noted that one who in effect is a "casual" fiduciary, who administers only a few estates on behalf of relatives, who is a principal beneficiary of the estates that he manages, and who is not required to perform substantial and extensive management activities, does not carry on a "trade or business" within the purview of Section 162. *United States* v. *Pyne*, *supra*, at 130-132. Although, as petitioner says (Pet. 5), the *Pyne* case dealt, directly, with the income tax of the estate, the entire rationale of the opinion was that the *executors* were not carrying on a trade or business. The case of *Wallace's Estate* v. *Commissioner*, 101 F. 2d 604

[3] As observed by the Court of Appeals (Pet. App. "B", p. 15), "Section 211(c) refers to Section 23 of the Internal Revenue Code of 1939. In accordance with Section 7852(b) of the Internal Revenue Code of 1954 we will deem Section 211(c) to refer to Section 162 of the 1954 Code."

(C.A. 4), chiefly relied on by petitioner, was decided before—and thus without the benefit of—this Court's later decision in *Pyne*. Nor is *Bayles* v. *Folsom*, 157 F. Supp. 866 (N.D. W. Va.) in point; there, the executor's duties necessitated the exercise of considerable managerial discretion, including reinvesting of the assets and the management of a perpetual trust.

2. That the Secretary and the court below were plainly correct in refusing to expand the term "trade or business" to include the relatively simple activities of petitioner is also shown by Internal Revenue Ruling 58-5, Cum. Bull. 1958-1 at p. 322 (Pet. App. "A", pp. 10-11), which announced the very standard applied by the social security administrators in this case.

CONCLUSION

This case presents no unresolved issue of law, but only a question which is essentially factual. The decision below is clearly correct and there is no conflict calling for review. We respectfully submit that the petition for a writ of certiorari should be denied.

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